No. 84-910

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IN THE

Supreme Court of the United States

October Term, 1984

BUFFALO BROADCASTING COMPANY, INC., KID BROADCASTING CORPORATION, KWTX BROADCASTING COMPANY, INC., METROMEDIA, INC. and STORER BROADCASTING COMPANY, On Behalf Of Themselves and All Persons or Entities Who Own Local Television Stations Which Obtain Music Performance Rights Pursuant to Music License Agreements With American Society of Composers, Authors and Publishers and/or Broadcast Music, Inc.,

Petitioners,

— against —

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, STANLEY ADAMS, as President of American Society of Composers, Authors and Publishers, CY COLEMAN, HAL DAVID, FAMOUS MUSIC CORP., MCA, INC., MORTON GOULD, SHAPIRO, BERNSTEIN & CO., INC., On Behalf of Themselves And All Other Members of American Society of Composers, Authors and Publishers, BROADCAST MUSIC, INC., AL GALLICO MUSIC CORP., PAUL ANKA, JERRY BOCK, SHELDON HARNICK, HOLLIS MUSIC, INC., and UNART MUSIC CORP., On Behalf of Themselves And All Other Affiliates Of Broadcast Music, Inc.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The ASCAP and BMI briefs ("ASCAP Opp."; "BMI Opp.") concede that the Court of Appeals' "rule of reason" analysis in this case never went beyond deciding that there was no "restraint of trade" because the local stations theoretically had alternatives to the blanket license (ASCAP Opp. 12; BMI Opp. 11). They also acknowledge that, despite this Court's mandate that the blanket license be subjected to "discriminating examination" under the rule of reason, *BMI* v. *CBS*, 441 U.S. 1 (1979), the Court of Appeals decided that it did not have to go beyond a "threshold" examination of whether there was any "restraint at all" and did not, accordingly, undertake the traditional rule of reason weighing of all the other pro- and anti-competitive effects of the challenged agreement in its market context (BMI Opp. 9). Assuming the legal correctness of the Court of Appeals' truncated analysis only of "alternatives," respondents characterize this case as involving merely a failure of proof on the part of the stations with respect to their ability to escape the harmful effects of the blanket license.

Respondents have thus joined petitioners in framing the pure legal issue here presented to this Court: As a matter of law, did the Court of Appeals err by, now concededly, failing to weigh all of the pro- and anti-competitive consequences of the blanket license as required by the rule of reason?

It is one thing to say that the potential for self-help (alternatives) is an element to be weighed among many others in balancing under the rule of reason. It is another, and clearly unprecedented and erroneous, to say that such a potential will, if it is arguably present, foreclose any consideration of all of the other pro- and anti-competitive consequences of a practice weighed in its market context.

The significance of this conceded major revision of the rule of reason, let alone the definition of restraint of trade, was described in our petition. Such error, compounded by the Court of Appeals' disregard of this Court's command that respondents' licensing practices be subjected to searching competitive scrutiny, without more, clearly warrants review by this Court. Nevertheless, we shall herein specifically respond to respondents' contentions that this case

presents "no novel, general or important legal issues" (ASCAP Opp. 11); that this case is but a "re-run" of the *CBS* litigation (ASCAP Opp. 13; BMI Opp. 10); and that the result below may be attributed to a simple failure of proof by petitioners (ASCAP Opp. 11; BMI Opp. 6).

1. *There was no "traditional" rule of reason inquiry below; the Court of Appeals did not follow this Court's mandate in CBS.* Conspicuously absent from respondents' submissions is any discussion of the *undisputed* evidence both in this case and in *CBS* of the substantial anti-competitive effects of the blanket license. Respondents thus totally ignore: this Court's findings in *CBS* that the blanket license constitutes literal "price fixing" by direct competitors and "concerted action in a large and active line of commerce," 441 U.S. at 9, 10; Justice Stevens's recognition that the blanket license has a "significant adverse impact on competition" in a market "that could be highly competitive but is not," *id.* at 26, 33; the Government's conclusions in *CBS* that respondents' blanket licensing practices reflect "substantial deviations from the competitive norm," inflict "[p]ersistent price discrimination," and manifest "the market power of a cartel" (Pet. App. 128a-129a & n.7); and the District Court's determination in the instant case, following a four-week trial, that with respect to the local television stations the blanket license "insulates [composers] . . . from price competition" and stifles the development of marketplace alternatives that would permit such price competition to take place (Pet. App. 58a).

These findings of substantial anti-competitive effects led this Court in *CBS* to remand for a "discriminating" examination of the overall competitive implications of the network blanket license under the rule of reason. 441 U.S. at 24. Indeed, they were sufficiently weighty to cause the Court to declare that the blanket license "may not ultimately survive" such examination. *Id.* In the instant case, such findings, coupled with a careful assessment of asserted pro-competitive benefits in the relevant market context, led the District Court to conclude that the anti-competitive consequences of the blanket license in this market so plainly outweighed any pro-competitive virtues as to

warrant an injunction against the blanket license in its application to the stations' syndicated programming.

Seemingly oblivious to these undeniable anti-competitive consequences of the blanket license, respondents assert that the Court of Appeals was justified in confining its competitive inquiry to the issue of "available alternatives," and in equating an asserted failure of proof by the stations that they lacked means of escape with the absence of *any* anti-competitive effects. Notwithstanding such a truncation of the competitive inquiry, respondents term the Court of Appeals' mode of analysis "appropriate" and "traditional" and "consistent with [this Court's] mandate in *CBS*" (ASCAP Opp. 12; BMI Opp. 12). Respondents' arguments are completely devoid of merit.

a. As the cases discussed in the petition (pp. 14-18, 24-25) make clear, it is unprecedented for a court to require the victims of an anti-competitive arrangement to bear the threshold burden of proving that there were no alternatives to which they could resort as a prerequisite to finding that arrangement to be a "restraint" under the Sherman Act warranting evaluation of all significant competitive consequences. Such a legal requirement would allow market arrangements including those, as here, foreclosing price competition among competitors enjoying significant market power, to go wholly unreviewed for their competitive implications. The development of such a rule, focusing exclusively on victim self-help, would effectively nullify the purposes of the antitrust laws: to assess the real-world effects of agreements among competitors on economic markets.

The record in the instant case amply demonstrates the untoward potential of such a rule: respondents' practices have been proven to eliminate price and quality competition; to impose persistent price discrimination; and to generate consumer dissatisfaction among an entire class of users.[1] All of this was irrelevant to the Court of Appeals.

1. Contrary to respondents' claim that the local stations have historically favored the blanket license (ASCAP Opp. 6-8), the trial record clearly established that the stations have sought for more than 30 years to secure competitive alternatives and, frustrated in that pursuit, have, at most, "only acquiesced in the development and maintenance of the blanket licensing system." (Pet. App. at 66a-68a).

All that mattered was that the local stations had, in the Court of Appeals' view, potential means of escape.[2]

Respondents do not come to grips with the petition's demonstration (pp. 16-18) that the Court of Appeals' rule would wreak havoc with a wide array of rule of reason and *per se* cases. Such consequences, emanating from such an important center of commerce as the Second Circuit, are, however, inevitable. The mere assertion (ASCAP Opp. 11; BMI Opp. 16) that what is here at issue is the "*sui generis* world of music performing rights licensing" does not limit the logic or language of the Court of Appeals' rationale—which has already been utilized by defendants in wholly unrelated industries as a means of avoiding searching competitive scrutiny of their conduct. (Pet. 25)[3]

b. Contrary to respondents' suggestions (ASCAP Opp. 12; BMI Opp. 10), nothing in the reasoning of this Court in *CBS* even remotely approves the mode of legal analysis adopted by the Court of Appeals. To the contrary, having acknowledged the serious anti-competitive potential of respondents' licensing practices, and having recognized that those practices "might not survive" searching competitive analysis in particular market contexts, this Court in *CBS* quite clearly contemplated that the blanket license would be subjected, when challenged, to the traditional weighing

2. It may well be true, as BMI suggests (BMI Opp. 16-17), that when presented with "meager evidence of anti-competitive effect," there are some instances in which the rule of reason can be applied "in the twinkling of an eye." But plainly this is not such a case. Where defendants comprise virtually all sellers in the market, do not compete with one another, engage in massive and persistent price discrimination, and cause consumer dissatisfaction with their pricing practices, a "quick look" will not suffice. The need for a searching competitive scrutiny of ASCAP's and BMI's practices has, of course, already been recognized by this Court in *CBS*, and by the Department of Justice in its *amicus* briefs. Indeed, the District Court's searching examination in this case, like that undertaken by Justice Stevens in *CBS*, merely confirms the blatant anti-competitive effects of the blanket license.

3. That few courts to date have been persuaded, on the facts presented, to follow the Second Circuit's reasoning (BMI Opp. 17) is beside the point. It should be noted, however, that one case cited by respondents, *F.E.L. Publications, Ltd.* v. *Catholic Bishop of Chicago*, 214 U.S.P.Q. 409 (7th Cir. 1982), appears to have adopted *in toto* the Second Circuit's rationale in connection with different marketing practices—involving print publication rights.

of its pro- versus anti-competitive effects in particular market applications. The Court plainly did not intend that the blanket license should be subjected to such scrutiny only after a user first has proven that it has attempted, and failed, to obtain licensing alternatives. This point is evident from the *CBS* opinion itself. CBS was found by this Court to have had "a real choice" between the blanket license and other alternatives. 441 U.S. at 24. That, however, did *not* dissuade the Court from remanding the case for a full evaluation of the blanket license's competitive effects.

As Justice Stevens pointed out, the availability of practical alternatives was an appropriate factor to be considered in the Court's determination that the blanket license is not *per se* illegal. *Id.* at 29. But it is certainly not the dispositive factor in any rule of reason analysis. *Id. See, e.g., Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.*, 549 F.2d 368, 381 (5th Cir. 1977). In the instant case, even were the Court of Appeals correct in its factual analysis concerning availability of alternatives (*see* discussion below at 7-9), the numerous and substantial anti-competitive effects of the license found by the District Court and the lack of offsetting pro-competitive benefits in this market context were more than sufficient to condemn respondents' licensing practices even in the face of such alternatives.

This Court's decisions in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) and *NCAA* v. *Board of Regents*, 104 S. Ct. 2948 (1984), lend no support to respondents' contentions that the truncated rule of reason analysis adopted by the Court of Appeals is consistent with this Court's mandate in *CBS* (BMI Opp. 12). To the contrary, in *Maricopa* this Court reiterated that "the rule of reason requires the fact finder to decide whether under all the circumstances of the case" a challenged practice is on balance pro- or anti-competitive, 457 U.S. at 343—relying on Justice Brandeis's classic articulation of the comprehensive nature of the factual inquiry mandated under the rule of reason. *Id.* at 343 n.13 (quoting *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918)). Likewise, in *NCAA* the Court engaged in a broad rule of reason examination of all aspects of the challenged television plan—

including its effect on prices and "consumer preference," noting that the latter factor is "perhaps the most significant." 104 S. Ct. at 2964.

While BMI refers to the Court's discussion in those cases of certain features of the blanket license which took the license out of the category of *per se* illegality, including the non-exclusive licensing rights possessed by ASCAP and BMI (BMI Opp. 12-14), neither such discussion nor anything else in the *CBS* opinion supports the conclusion that the blanket license lacks any anti-competitive effect merely because it technically leaves composers and publishers free to enter into individual licensing arrangements. The Court's instructions to subject the blanket license to the "discriminating examination" of the rule of reason are wholly inconsistent with such a reading. Indeed, were such a licensing option viewed by the Court as dispositive of the competitive inquiry, the Court would have upheld the physicians' maximum price-fixing scheme in *Maricopa*, rather than finding the arrangement blatantly anti-competitive and *per se* illegal, since the doctors, like the copyright owners in this case, had complete freedom to negotiate individually and charge less than the fixed rates. 457 U.S. at 341.[4]

2. *Respondents' attempt to equate the local stations' case to a vast network case.* ASCAP and BMI repeatedly contend that this case is but a "re-run" of *CBS* (ASCAP Opp. 13; BMI Opp. 10), raising no new legal issues warranting resolution by this Court. While it is true that the Court of Appeals first adopted the erroneous restraint standard here challenged in *CBS Remand*, the factual and legal posture of the *CBS* litigation when brought to this Court for review was, as noted in the petition (pp. 9, 22-23), vastly different from that of the instant case. CBS had asserted a "tie-in" or "coercion" theory that it could not substantiate at trial. The stations here relied on no such coercion theory, but instead tried a traditional rule

4. Nor do other previously-decided music performing rights decisions (ASCAP Opp. 14) lend support to respondents' position. *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), predates *CBS* and is of doubtful continuing validity. *BMI* v. *Moor-Law, Inc.*, 527 F.Supp. 758, 765 (D. Del. 1981), *aff'd mem.*, 691 F.2d 490, 491 (3d Cir. 1982), on the other hand, properly construed this Court's *CBS* opinion to require close examination of all competitive effects of the blanket license.

of reason case in which all of the competitive consequences of the blanket license in this market were explored.

The Solicitor General, sharply disagreeing with the Second Circuit's mode of analysis in *CBS Remand* and its failure to address the obvious anti-competitive effects of the blanket license, nevertheless advised this Court that the panel's decision in that case could be justified based solely on the peculiar record which had been developed by CBS. (Pet. App. 129a). Notably, however, the Solicitor General further advised that any extension of the holding in *CBS Remand* to other market contexts (such as has now occurred in this case) would warrant "summary reversal" by this Court.[5] (*Id.*, 131a n.13).

3. *The so-called failure of proof.* Relying on the narrow "restraint" formulation of the Court of Appeals, respondents proceed to characterize this case as one involving, at most, a "failure of proof" on the part of the stations (ASCAP Opp. 11; BMI Opp. 6). Of course, these alleged failures of proof relate to the issue erroneously viewed as dispositive by the Court of Appeals—the availability of alternatives. While BMI is in error in claiming (BMI Opp. 10 n.12) that petitioners do not dispute the correctness of the Court of Appeals' conclusions on this issue (*see* discussion below), petitioners do assert that the Court of Appeals' exclusive focus on this issue constitutes a fundamental misapprehension of the rule of reason worthy of review by this Court. Respondents' characterization of this case as involving mere insufficiencies of proof accordingly is wide of the mark: had the Court of Appeals properly conducted a full rule of reason analysis and considered, not merely the purported availability of alternatives, but also the totality of evidence concerning the blanket license's effect on competition in the relevant market, it would have had to conclude—as did the District Court based on a full review of all relevant evidence—that

5. The trial record developed in this case demonstrates the totally different market circumstances confronting the multitude of individual broadcasters located across the nation in comparison to those confronting CBS, "the giant of the world in the use of music rights." 441 U.S. at 4. (Pet. App. 70a). There is, in this case, a particularly great need to protect over 750 relatively small and widely dispersed consumers against the aggregated market power—subsuming virtually all sellers in the market—exercised by ASCAP and BMI.

the challenged application of the blanket license violates the Sherman Act.

Notwithstanding its subsidiary importance in a rule of reason case such as this, the improper manner in which the Court of Appeals reviewed the evidence on the issue of "available alternatives" deserves brief discussion. The District Court here, following the Court of Appeals' direction in *CBS Remand,* carefully examined the issue of whether individual local television stations enjoyed realistically available marketing alternatives to the blanket license. Following a four-week bench trial, the taking of testimony from seven witnesses from the television industry, six composer and music publisher witnesses, and four expert witnesses, and review of a record including extensive documentary exhibits and deposition testimony, the court found as a matter of fact that none of the three purportedly available alternative licensing mechanisms was practically available to the stations. (One of these three, producer "source licensing," was recognized by the District Court as potentially providing a competitive and highly efficient market alternative to the blanket license, but the court found that the stations were unable to obtain such a licensing alternative so long as the blanket license remained in effect.) The District Court's opinion repeatedly refers to the "uncontroverted" facts and data supporting its factual findings and contrasts respondents' failure to present any evidence of any kind with respect to many of them.[6] (Pet. App. 51a n.11, 54a, 57a n.21, 59a-60a, 77a, 80a n.42).

With respect to each such alternative, moreover, the District Court painstakingly distinguished the individual stations' circumstances from those of CBS. Thus, WIVB-TV in Buffalo was found to be utterly dissimilar from CBS in its ability to escape the effects of the blanket license—

6. Respondents' own witnesses provided much of petitioners' evidence. For example, ASCAP's president and its former general counsel admitted that the "direct licensing" alternative—*i.e.*, each individual station fulfilling its music licensing requirements by seeking out, and negotiating license terms with, thousands of composers and music publishers—was "impossibly difficult." (Trial Transcript, Dec. 11 & 15, 1981 at 1830-31, 2070-71). Similarly compelling testimony was adduced with respect to the non-availability of the so-called per program license offered by ASCAP and BMI and of producer source licensing. (Pet. App. 68a-70a).

not based on the trial court's mere intuition (BMI Opp. 5), but on overwhelming record evidence. This finding is hardly surprising: the individual local stations are relatively small, disparate consumers of music acting in hundreds of separate markets. CBS, in contrast, is a major program producer controlling access to more than 200 television markets, and is itself a major music publisher.

Not finding a single one of the District Court's findings to be "clearly erroneous," as it was required to do before overturning those findings, *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982), the Court of Appeals nonetheless criticized petitioners for having failed to proffer additional evidence relating to the Court of Appeals' newly hypothesized theory of the market and of the stations' potential ability to pursue alternatives to the blanket license. As an example, although the record evidence was uncontradicted that direct licensing transactions between individual stations and composers were utterly infeasible, the Court of Appeals relied on a lack of evidence "that any local station had ever offered any composer a sum of money in exchange for performing rights." (Pet. App. 24a).

Thus, after substituting its theoretical views for record evidence, the Court of Appeals reversed and dismissed the complaint—without affording the stations any opportunity, on remand, to address the new evidentiary issues viewed by the Court of Appeals to be relevant.

4. In sum, ASCAP's and BMI's efforts to harmonize the Second Circuit's decision in this case with prior precedent, to lump the local stations together with CBS, and to portray this as a mere failure of proof case, do not succeed in diminishing the importance of the issues presented for review by this Court. There is, in the Court of Appeals' decision, an undeniable conflict with past decisions of this Court and of other Circuits which recognize the need for an evaluation of all substantial pro- and anti-competitive effects in rule of reason cases. The decision drains the rule of reason of economic substance. It selects one element of the total economic context of the restraint—the theoretical availability of alternatives—and, finding such theoretical alternatives, elevates that one element to a status which

forecloses consideration of all of the other pro- and anti-competitive consequences. Such a reading of the Sherman Act is without precedent—because it is simply wrong.

The Second Circuit's decision comes at a time when this Court and the Justice Department are increasingly relying upon the rule of reason as the principal tool of antitrust enforcement. A clear formulation of the rule's elements and economic rationale are particularly important at this time. The Second Circuit's formalistic reliance on theoretical alternatives to the exclusion of all other pro- and anti-competitive consequences is certain to be invoked by litigants in private and government enforcement proceedings, and will erect a barrier to effective antitrust enforcement. Review by this Court is needed to dispel the confusion created by the decision below.

The Second Circuit's decision also conflicts with this Court's decision in *CBS*. The Second Circuit's legal standard effectively eliminates antitrust scrutiny in a "large and active line of commerce," contrary to this Court's direction that anti-competitive practices in that line of commerce must be closely scrutinized. In these circumstances, review by this Court is fully warranted.[7]

Conclusion

It is therefore respectfully requested that the petition for a writ of certiorari be granted.

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7. In view of the participation by the United States in prior cases arising in this context, and in view of its continuing supervisory responsibilities (*CBS, supra*, 441 U.S. at 13), the Court may wish to request the Solicitor General to express the views of the United States.

Respectfully submitted,

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